121-484

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 255.

GEORGE C. McCOY, APPELLANT,

vs.

FREDERICK NELSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED JUNE 17, 1884.

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INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	1	1
Subpœna	14	6
Marshal's return	15	7
Appearance of defendant	16	7
Demurrer to bill	17	8
Order sustaining demurrer, and decree	19	9
Order granting appeal &c.	20	9
Bond	22	10
Citation	24	11
Proof of service of citation	25	11
Clerk's certificate	26	12

JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 15th day of June, A. D. 1883, came George C. McCoy, by John C. Stallcup, Esq., his solicitor, and filed in said court his bill of complaint, and sued out of and under the seal of said court a writ of subpœna against Frederick Nelson; and the said bill of complaint is in words and figures as follows, to wit:

Bill of Complaint.

2 United States Circuit Court, District of Colorado. In Equity.

GEORGE C. McCOY *vs.* FREDERICK NELSON.

To the honorable the judges of the circuit court of the United States for the district of Colorado:

George C. McCoy, a citizen of the State of Colorado, residing in the city of Denver, in the county of Arapahoe, in the State of Colorado, brings this his bill of complaint against Frederick Nelson, a citizen of the State of Colorado, residing the county of Arapahoe, in the State of Colorado, and in the city of Denver therein.

And your orator respectfully represents unto your honors that he is the original and first inventor of a new and useful improvement and invention in boots, which are fully and particularly described in the letters patent hereinafter mentioned, and which had not been known or used before his said invention.

And your orator further represents unto your honors, being so as aforesaid the first inventor and discoverer of the said improvement and invention, and being also a citizen of the United States, — did, upon due application therefor, obtain letters patent of the United States, dated the 14th day of March, A. D. 1882, for the said
3 invention and improvement, in due form of law, under the seal of the Patent Office of the United States, signed by the Secretary of the Interior and countersigned by the Commissioner of Patents of the United States, whereby was granted and secured unto your orator, his heirs, administrators, and assigns, or intended so to be, for the term of seventeen years from and after the said date of the said letters patent, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention and improvement, which said letters patent are now remaining on record in the Patent Office of the United States, and by virtue whereof your orator became and was the sole owner of all the rights and privileges granted and secured in and by the said letters patent; which letters patent are in the words and figures following, and which original letters patent and specifications, ready in court to be produced, will fully and at large appear:

4 "UNITED STATES OF AMERICA.

"No. 254,993.

"To all to whom these presents shall come:

"Whereas George C. McCoy, of Denver, Colorado, has presented to the Commissioner of Patents a petition praying for the grant of letters patent for an alleged new and useful improvement in boots, a description of which invention is contained in the specifications, of which a copy is hereto annexed and made a part hereof, and has complied with the various requirements of law in such case made and provided; and whereas, on the examination made, the said claimant is adjudged to be fully entitled to a patent under the law:

"Now, therefore, these letters patent are to grant unto the said George C. McCoy, his heirs or assigns, for the term of seventeen years from the 14th day of March, A. D. 1882, the exclusive right to make and vend the said invention throughout the United States and Territories.

"In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the city of Washington, the 14th day of March, A. D. 1882, and of the Independence of the United States the one hundred and sixth.

"A. BELL,
Acting Secretary of the Interior.

"Countersigned:

[Seal Patent Office of the United States of America.]

"E. M. MARBLE,
Commissioner of Patents."

5 (Here follows diagram marked p. 6.)

7 UNITED STATES PATENT OFFICE.

GEORGE C. McCOY, of Denver, Colorado.

Boot.

Specification forming part of letters patent No. 254,993, dated March 14, 1882. Application filed December 21, 1881. (Model.)

To all whom it may concern:

Be it known that I, George C. McCoy, of Denver, in the county of Arapahoe and State of Colorado, have invented a new and improved boot, of which the following is a full, clear and exact description.

The object of my invention is the production of a boot of novel and improved construction, as hereinafter described and claimed.

Reference is to be had to the accompanying drawings, forming a part of this specification, in which similar letters of reference indicate corresponding parts in all the figures.

Figure 1 is a perspective view of my improved boot; Fig. 2 is a cross-sectional view of the same taken on the line *x x* of Fig. 1; Fig. 3 is a plan view of the quarters; Fig. 4 is a plan view of the vamp.

Fig. 5 is a plan view of the tongue; Fig. 6 is a plan view of the front piece of the boot-leg leading from the top of the leg down to the lacing, and Fig 7 is a plan view of the outside counter of the boot.

The sole and heel of the boot are of ordinary form, and the upper and counter may be secured to the sole by any of the well-known and common means.

B represents the vamp; C, the leg, which is formed mainly of the quarters *d d;* and E represents the counter, which is of sole-leather and secured upon the outside of the boot, as shown in Fig. 1. The quarters *d d* are stitched together in the back, and the seam is covered by the lap or strip *c*. In front they are stitched from the top down only a short distance, as shown in Fig. 1, and the seam is covered by the lap or strip *f*. The lower curved outer ends *a a* of the quarters are stitched to the vamp B, as shown in Fig. 1. By forming the leg in this manner the opening F is left in the main material of the leg, which opening is to be drawn together when the boot is put on by lacing, the hooks *e e* and the holes *i i* and the cord or string *h* being provided for that purpose. This opening F is closed by the tongue G, of leather, which tongue is of the form shown in Fig. 5, and is stitched on all of its sides to the quarters and the vamp-piece B, thus closing the opening F against all possible entrance of water, dirt, or snow.

The leg is provided at the top with the strap *g* and buckle *j* for closing the top of the boot tightly around the leg of the wearer to prevent the entrance of dirt or snow.

The counter E of sole-leather, secured upon the outside of the leg, protects that part of the boot from being cut and rapidly worn from coming in contact with sharp edges and points of rock, which makes the boot more especially adapted for miners' use.

The lacing of the boot is of great advantage to make the boot fit and support the foot and ankle, and to prevent movement of the boot in walking. Besides, less heavy material is required in making the boot, owing to the opening F left in the leg.

Having thus described my invention I claim as new and desire to secure by letters patent the herein-described boot, consisting of the vamp B, the quarters *d*, sewed together in the back and a short distance in front from the top down, and provided with the hooks *e*, holes *i*, and a suitable lacing device, the strip *f*, secured over the said front seam, and the tongue G, secured to the said leg-pieces and vamp, substantially as set forth.

GEORGE CELLERS McCOY.

Witnesses:
LUTHER S. KAUFFMAN.
S. A. WHEELER, Jr.

8 And your orator further represents unto your honors that by virtue of the premises he became and was and is the owner of the before-described letters patent, and of the invention and improvement therein mentioned and referred to, and of all the rights and privileges granted and secured, or intended to be granted and

secured, thereby, and that he has invested and expended large sums of money and has been at great trouble and expense in and about the said invention and for the purpose of carrying on the business of manufacturing and selling boots containing it and making the same profitable to himself and useful to the public, and that the said invention has been and is of great benefit, utility, and advantage, and that boots were made according to the said invention and containing it and sold by your orator to the great advantage of the public, and that the public have generally acknowledged and acquiesced in the validity of the said letters patent and in the aforesaid rights of your orator, and your orator believes that he will realize and receive large gains and profits therefrom if infringements by the defendant and his confederates shall be prevented.

And your orator further represents unto your honors that the defendant, Frederick Nelson, well knowing the premises and also the rights secured to your orator as aforesaid, but contriving to injure your orator and to deprive him of the benefits and advantages which might and otherwise would accrue unto him from said inven-
9 tion, after the issue of the said letters patent as aforesaid, and after your orator became the owner thereof as aforesaid, and before the commencement of this suit, as your orator is informed and believes, manufactured, used, and vended to others to be used, boots containing and embracing the said invention, in the said county of Arapahoe, in the said district of Colorado, so granted to your orator as aforesaid, and of manufacturing and selling them, by agents and otherwise, in various places in said district of Colorado.

And your orator further represents unto your honors that such use and sale of said boots have been and are without license or consent and against the will of your orator, and in violation of his rights, and an infringement of the aforesaid letters patent, and that said unlawful acts and infringements have been committed by the defendant with full knowledge of the said rights of your orator and in defence thereof, and that all the said unlawful acts and doings of the defendant are in defiance of the rights acquired by and secured to your orator as aforesaid, and to his great and irreparable loss and injury, and by which he has been and still is being deprived of great gains and profits which he might and otherwise would have obtained, but which have been received and enjoyed by the defendant by and through his aforesaid unlawful acts and doings.

10 And your orator further represents unto your honors that he is informed and believes that the defendant has many times made and sold large quantities of said boots and is still engaged in selling the same, and has a large quantity thereof on hand which he is offering for sale, and that he has made large gains, profits, and advantages from such sales, but to what extent and how much exactly your orator does not know and prays a discovery thereof.

And your orator further represents that the use of the said invention by the defendant, and his preparations for and avowed determination to continue the same, and his other aforesaid unlawful acts, in disregard and defiance of the rights of your orator, have the effect

to induce and encourage others to venture to infringe said letters patent, in disregard of your orator's rights.

And your orator further represents unto your honors that he has caused notice to be given to the said defendant of said infringements and of the rights of your orator in the premises, and requested him to desist and refrain therefrom, but he has disregarded said notice and refused to desist from said infringements, and has continued the use, manufacture, and sale of said boots since said notice and still continues the manufacture and sale thereof in infringement of said letters patent.

And forasmuch as your orator can have no relief except in this honorable court, to the end, therefore, that the defendant
11 may, if he can, show why your orator should not have the relief herein prayed for, and may, upon his corporal oath and according to his best and utmost knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to the premises and all — several matters and things herein before stated and charged as fully and particularly as if separately interrogated thereto, and that the said defendant may be compelled to account for and pay your orator the profits by him acquired and the damages suffered by your orator from his aforesaid unlawful acts, and to render an account of the number of boots manufactured and sold by him, and when and where, and to whom they were sold, and for what price, and what they cost the defendant;

And your orator prays that the defendant may be compelled to account as aforesaid, and that he and his servants, agents, attorneys, and workmen, and each and every of them, may be restrained and enjoined by the order and injunction of this honorable court from directly or indirectly making, constructing, using, vending, delivering, and putting into practice, operation, or use, or in anywise counterfeiting, or imitating the said invention or any part thereof, or any boots made in accordance therewith, or alike or similar to those which he has heretofore sold, and that the defendant may be decreed to pay the costs of this suit, and that your orator may have such other and further relief as to this honorable court shall seem
12 meet and as may be agreeable to equity—

May it please your honors to grant unto your orator the writ of injunction, issuing out of and under the seal of this honorable court, commanding, enjoining, and restraining the defendant, his servants, agents, attorneys, and workmen, and each and every of them, as is hereinbefore in that behalf prayed.

May it please your honors to grant unto your orator the writ of subpœna, issuing out of and under the seal of this honorable court, directed to the defendant, commanding him by a certain day, under a certain penalty, to be and appear in this honorable court, then and there to answer the premises, and to stand and abide such order and decree as may be made against him.

(Signed) STALLCUP, LUTHE & SHAFRATH,
Solicitors for Complainant.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

George C. McCoy, of lawful age, being first duly sworn, deposeth and saith that he is the complainant above named; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own personal knowledge, except as to the matters and things therein stated on information and belief,
13 and as to those matters and things the same are true, as affiant verily believes.

(Signed) GEORGE C. McCOY.

Subscribed and sworn to before me this 16th day of June, A. D. 1883.

[Seal U. S. Dist. Court.]

(Signed) EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk.*

Endorsed: 1244. Circuit court U. S. Geo. C. McCoy *vs.* Frederick Nelson. Bill of compl't in equity. Filed Jun. 16, 1883. (Signed) Edward F. Bishop, clerk. Stallcup, Luthe & Shafrath, solicitors for complainants.

And the said subpœna is in words and figures as follows, to wit:

14 *Subpœna in Chancery.*

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

United States Circuit Court, District of Colorado.

The President of the United States of America to Frederick Nelson, Greeting:

You are hereby commanded that you appear before the judges of the circuit court of the United States of America for the district of Colorado, at the city of Denver, in said district, on the first Monday in August next (it being the 6th day of August, A. D. 1883), to answer the bill of complaint of George C. McCoy, this day filed in the office of the clerk of said court, in said city of Denver, then and there to receive and abide by such judgment and decree as shall then or thereafter be had upon said bill of complaint, upon pain of judgment being pronounced against you by default and a decree had and entered accordingly.

To the marshal of the district of Colorado to execute and make due return.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, and the seal of the said circuit court, at the city of Denver aforesaid, this sixteenth day of June, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the 107th year.

[Seal Circuit Court U. S.]

(Signed) EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk.*

Memorandum.

The above-named defendant is hereby notified that unless he shall enter his appearance in the office of the clerk of said court, at the city of Denver aforesaid, on or before the day to which the above writ is returnable the complainant's bill will be taken against him as confessed and a decree entered accordingly.

(Signed) EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

15 Endorsed: Gen. No. 1244. Circuit court of the United States for the district of Colorado. In chancery. George C. McCoy *vs.* Frederick Nelson. Subpœna. Returnable to rule day, first Monday in August, A. D. 1883. Edward F. Bishop, clerk. Filed this 16th day of June, A. D. 1883. (Signed) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. Stallcup, Luthe & Schafrath, of Denver, compl't's sol'rs.

Marshal's Return.

DISTRICT OF COLORADO, *ss:*

DENVER *June 16th*, 1883.

I have duly executed the within writ by personally delivering a true copy of the within to Frederick Nelson, at Denver, Arapahoe county, Colorado, June 16th, A. D. 1883.

(Signed) WALTER A. SMITH, *Marshal*,
By SIM. W. CANTRIL,
Deputy Marshal.

Marshal's fees:

Service, 1 person, at $2.00 ea.	$2 00
Mileage, 1 m., at 6c., going only	06
Total	$2 06

Paid by Stallcup, Luthe & Shafrath.

16 *Appearance of Defendant.*

And afterwards and on, to wit, the 1st day of August, A. D. 1883, came the said defendant, by Messrs Bentley and Vaile, and filed in said court and in said cause his appearance herein; and the said appearance is in words and figures as follows, to wit:

DISTRICT OF COLORADO, *ss:*

In the Circuit Court of the United States for the District of Colorado.

In Re GEORGE C. McCOY
vs.
FREDERICK NELSON. } No. 1244.

We do hereby certify that we have been retained by and appear

in the above-entitled cause for and in behalf of the above-named defendant.

Dated July 31, A. D. 1883.

(Signed) BENTLY & VAILE,
Defendant's Solicitor.

[Endorsed:] No. 1244. Circuit court United States, district of Colorado. In the Matter of George C. McCoy *vs.* Frederick Nelson. Attorneys' appearance. M'r. Bently & Vaile, on behalf of defendant. Filed this 1st day of August, A. D. 1883. (Signed) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk.

17 *Demurrer to Bill of Complaint.*

And afterwards and on, to wit, the 3rd day of September, A. D. 1883, came again the said defendant, by Messrs. Bently and Vail, his solicitors, and filed in said court and in said cause his demurrer to the bill of complaint herein; and the said demurrer is in words and figures as follows, to wit:

In the Circuit Court of the United States, District of Colorado. In Equity.

GEORGE C. McCOY, Complainant,
vs.
FREDERICK NELSON, Defendant.

The demurrer of Frederick Nelson, the defendant, to the bill of complaint of George C. McCoy, complainant.

This defendant by protestation, not confessing all or any of the matters and things in the complainant's bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, — that the complainant hath not in and by his said bill made or stated such a case as entitles him in a court of equity to any discovery from this defendant or to any relief against him as to the matters contained in the said bill, or any of such matters.

18 Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant doth demur thereto, and humbly prays the judgment of this honorable court whether he should be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

Dated September 3, 1883.

(Signed) BENTLEY & VAILE,
Solicitors for Def't.

STATE OF COLORADO, } *ss:*
County of Arapahoe, }

Frederick Nelson, of said county, of full age, being duly sworn according to law, saith that the foregoing demurrer is not interposed for delay, but in good faith, for the causes therein set forth.

(Signed) FRED. NELSON.

Sworn and subscribed before me this 3d day of September, A. D. 1883.

[NOTARIAL SEAL.]

(Signed) FRANKLIN P. SPECK,
Notary Public.

I certify that I have perused the complainant's bill in the above-stated cause, and that in my opinion the foregoing demurrer is well-founded in point of law.

Sept'r 3, 1883.

(Signed) J. A. BENTLEY,
Of Counsel for Defendant.

[Endorsed:] No. 1244. Circuit court of the United States for the district of Colorado. In chancery. George C. McCoy *vs.* Frederick Nelson. Demurrer to bill. Filed Sept. 3, 1883. (Signed) Edward F. Bishop, clerk. Bentley & Vaile, def't's solicitors.

19 *Order. Demurrer Sustained and Bill Dismissed.*

And afterwards and on, to wit, the 23d day of January, A. D. 1884, the same being one of the regular juridical days of the October term, A. D. 1883, of said court—present the Honorable Moses Hallett, district judge— the following proceeding was had and entered of record in said court and in said cause, to wit:

Bill for an Accounting and Other Relief.

GEORGE C. McCOY
vs.
FREDERICK NELSON. } In Chancery. 1244.

At this day comes the said complainant, by J. C. Stallcup, Esq., his solicitor, and the said defendant, by J. A. Bentley, Esq., his solicitor, also comes.

And the demurrer of the said defendant to the bill of complaint herein having heretofore come on to be heard, and having been argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises;

It seemeth to the court here that the said bill of complaint and the matters and things therein alleged *is* not sufficient in law for the said defendant to answer unto, and so the said demurrer is sustained.

Wherefore it is ordered, adjudged, and decreed, that this said bill of complaint be dismissed at the cost of the said complainant, to be taxed.

20 *Order Granting Appeal and Fixing Amount of Bond.*

And afterwards and on, to wit, the 25th day of January, A. D. 1884, the same being one of the regular juridical days of the October term, A. D. 1883, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Bill for an Accounting, an Injunction, and Other Relief.

GEORGE C. McCOY, *vs.* FREDERICK NELSON. } In Chancery. 1244.

At this day comes the said complainant, by J. C. Stallcup, Esq., his solicitor, and here in open court prays an appeal from the decree herein of this court to the Supreme Court of the United States, which is allowed him, conditioned, nevertheless, that he file herein his bond in said appeal in the sum of two hundred and fifty dollars ($250.00), conditioned according to law, and with surety to be approved by a judge of this court.

And afterwards and on, to wit, the 29th day of January, A. D. 1884, came again the said complainant, by J. C. Stallcup, Esq., his solicitor, and filed in said court and in said cause his bond on appeal herein.

21 And said bond is in words and figures as follows, to wit:

Bond in Appeal or Error.

United States Court, Colorado.

22 THE UNITED STATES OF AMERICA, *District of Colorado:*

Know all men by these presents that we, George C. McCoy, as principal, and L. A. Watkins, and Alonzo Rice, as sureties, are held and firmly bound unto Frederick Nelson in the full and just sum of two hundred and fifty dollars, to be paid to the said Frederick Nelson; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 26th day of January, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately at the October term, A. D. 1883, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between George C. McCoy, complainant, and Frederick Nelson, defendant, judgment was rendered against the said George C. McCoy, — having been allowed an appeal from said judgment to the Supreme Court of the U. S., and a citation directed to the said —— ——, citing and admonishing — to be and appear at a — court of the United States, to be held at — on the — day of — next.

Now the condition of the above obligation is such that if the said George C. McCoy shall prosecute said appeal to effect, and answer all damages and costs if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

(Signed) GEORGE C. McCOY. [SEAL.]
(Signed) L. A. WATKINS. [SEAL.]
(Signed) ALONZO RICE. [SEAL.]

Approved—
(Signed) MOSES HALLETT,
Dist. Judge.

23 Endorsed: Gen. No. 1244. Circuit court of the United States, district of Colorado. George C. McCoy *vs.* Frederick Nelson. Bond by compl't in appeal, $250.00. Filed this 29 day of Jan'y, A. D. 1884. (Signed) Edward F. Bishop, clerk.

24 *Citation.*

THE UNITED STATES OF AMERICA, *District of Colorado:*

The United States of America to Frederick Nelson and Messrs. Bently & Vaile, your attorneys, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden at Washington, in the District of Columbia, on the 2nd Monday of October next, pursuant to an appeal which was lately prayed and allowed, and in pursuance whereof bond is filed in the clerk's office of the circuit court of the United States for the district of Colorado, Denver division, wherein George C. McCoy was there complainant and in said appeal is appellant and you were there defendant and in said appeal you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 26th day of January, in the year of our Lord one thousand eight hundred and eighty-four.

MOSES HALLETT, *Judge.*

25 *Proof of Service.*

THE UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

On this 1st day of February, A. D. 1884, personally appeared John F. Shafrath before me, the subscriber, a clerk of the circuit court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to Messrs. Bently and Vaile, attorneys and solicitors of the appellee, Frederick Nelson.

JOHN F. SHAFRATH.

Subscribed and sworn to before me this 1st day of February, A. D. 1884.

[Seal United States District Court, District of Colorado.]

EDWARD F. BISHOP,
Clerk Dist. Court U. S.

[Endorsed:] 1244. Circuit court of the United States, district of Colorado. George C. McCoy, appellant, *vs.* Frederick Nelson, appellee. Citation. Filed Feb. 1, 1884. Edward F. Bishop, clerk. Stallcup & Shafrath, attorneys for appellant.

26 UNITED STATES OF AMERICA, }
District of Colorado, } ss:

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore filed or entered of record in said court, and in a certain cause lately in said court pending, wherein George C. McCoy was complainant and Frederick Nelson was defendant, as fully and completely as the same still remains on file and of recod in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this eighteenth day of March, A. D. 1884.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk.*
By T. W. TUPPER, *Deputy Clerk.*

Transcript, 55 fols. ------	5 50
Certificate ----------	35
	5 85

Paid by Stallcup & Shafrath, att'ys for pl'ff.

Endorsed on cover: Colorado C. C. U. S. No. 255 George C. McCoy, appellant, *vs.* Frederick Nelson. Filed 17th June, 1884.

121-464

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

GEORGE C. McCOY, *appellant*,

vs.

FREDERICK NELSON.

No. 464.

Appeal from the Circuit Court of the United States for the District of California.

[illegible]
for Appellant.

[illegible]

2

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

GEORGE C. McCOY, *appellant*,

vs.

FREDERICK NELSON.

No. 255.

Appeal from the Circuit Court of the United States for the District of Colorado.

APPELLANT'S BRIEF.

The record in this case is limited to a bill for an injunction to restrain the infringement of a patent, accompanied by a prayer for an account and payment by the defendant to the plaintiff of the profits acquired by the defendant from such infringement, a demurrer thereto and a decree thereon.

The bill, after the address to the court and the statement of the parties, avers that the plaintiff is "the original and first inventor of a new and useful improvement and invention in boots, which are fully and particularly described in the letters patent hereinafter mentioned and which had not been known or used before his said invention." (Rec., p. 1) It

then recites the application for letters patent by the inventor for said invention in due form of law; the issue of the letters, their attestation by the proper officers and delivery to the patentee; (id.) whereby, the plaintiff became, and was the sole owner of all the rights secured thereby. The letters and specifications are then set forth (id. 2) and the bill avers, that after the issuing of the patent, the plaintiff put his invention into use; that, "he has invested and expended large sums of money, and has been at great trouble and expense in and about the said invention, and for the purpose of carrying on the business of manufacturing and selling boots containing it, and making the same profitable to himself, and useful to the public, that," boots were made according to said invention, and containing it and sold by "the plaintiff" to the great advantage of the public, and that the public have generally acknowledged and acquiesced in the validity of the said letters patent, and in the aforesaid rights of "the plaintiff. The bill then avers that after the issue of the said letters patent, and after the plaintiff became the owner thereof, the defendant manufactured, used and vended to others to be used boots containing and embracing the said invention, without the license or consent, and against the will of the plaintiff, with full knowledge of the said rights of the plaintiff, and in defiance thereof, and that all said unlawful acts and doings of the defendant are in defiance of the rights acquired by and secured to the plaintiff (id. 4); these averments are followed by the statement — "and your orator further represents unto your Honors that he has

caused notice to be given to the said defendant of said infringements, and of the rights of your orator in the premises, and requested him to desist and refrain therefrom; but, he has disregarded said notice and refused to desist from said infringements, and has continued the use, manufacture, and sale of said boots, since said notice, and still continues the manufacture and sale thereof, in infringement of said letters patent" (id. 5). The prayer of the bill is for a discovery upon oath, and an answer to the averments of the bill, for a decree that the defendant account for and pay over the gains and profits which have accrued to him from using the invention, and for an injunction to restrain the defendant from the further use of the invention. The bill is sworn to by the usual affidavit (id. 6).

To this bill there is filed a general demurrer (id., 8), whereby the defendant necessarily admits that the plaintiff is the original and first inventor, of a new and useful improvement and invention in boots; that upon due application therefor he did obtain the letters patent as alleged and set forth, and did thereby become the sole owner of all the rights secured thereby; that, as such sole owner, the plaintiff did put his invention into use to the great advantage of the public, which generally acknowledged and acquiesced in the validity of said letters patent, and the plaintiff's rights therein, and that after the issue of the said letters patent, with full knowledge of the plaintiff's rights therein, and in defiance thereof, and notwithstanding requests to desist therefrom, the defendant had unlawfully infringed the said patent, and refused and continues to refuse to desist from said infringement. The demurrer, in effect, inquires of the

plaintiff, "assuming each and all of these averments to be true, what are you going to do about it?" This question having been in turn, propounded by the plaintiff to the Circuit Court of the United States, for the District of Colorado, receives for answer "you can do nothing about it." The decree of the court is in the following terms:

"It seemeth to the court here that the said bill of complaint and the matters and things therein alleged is not sufficient in law for the said defendant to answer unto, and so the said demurrer is sustained. Wherefore it is ordered, adjudged and decreed, that this said bill of complaint be dismissed at the cost of the said complainant, to be taxed." Rec. p. 9.

The issue which is squarely raised by this decree is whether a bill for an injunction to restrain the infringement of a patent will lie in the Circuit Court of the United States for the District of Colorado; for with the single exception of a failure to aver that the plaintiff's right had been previously established by an action at law, against the same or any other party, or that an injunction had been previously obtained against the same or any other party the plaintiff here has made every averment, material and immaterial, which can be either demanded or imagined for such a bill.

Points and Authorities.

Property in a patent is just as much under the protection of the law as property in land. *Cook* vs. *Ernest*, 5 Fish., 396. The grant of letters patent for an invention creates a legal estate, consisting of the exclusive right to make, vend, or use the subject of

the grant for a specified period. The patentee, in virtue of his patent, has a *prima facie* legal right. So far as the judgment of the Patent Office affects the case, this question had been decided in favor of the plaintiff, he having the decision (*ex-parte*, it is true, and therefore not conclusive) of what has been called a "*quasi* judicial tribunal." GRIER, J., in *Goodyear* vs. *Dunbar*, 1 Fisher, 473.

"While the decision of the Commissioner of Patents is not entitled, upon this question, to the force of *res adjudicata*, yet it is a determination entitled to the highest respect of the courts, and should not be reversed except upon the most satisfactory proof." WOODS, J., in *Cook* vs. *Ernest*, 5 id., 396. "Evidence of doubtful probative force will not overthrow the presumption of novelty and originality arising from the grant of letters patent for an invention. The defence of want of novelty must be made out by proof so clear and satisfactory as to remove all reasonable doubts." *Am. Bell Telephone Co.* vs. *People's*, &c., 22 Fed. Rep., 309.

The writ of injunction issues on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which, on just and equitable grounds, ought to be prevented. A special presumption that the patent is valid lies at the foundation of a patentee's right to an injunction. That presumption not only exists, but every other conclusion is excluded, where the defendant does not deny the validity of the patent. *Sickels* vs. *Mitchell*, 3 Blatchf., 548; *New York Grape Sugar Co.* vs. *American Grape Sugar Co.*, 10 Fed. Rep., 835; *Ogle* vs. *Edge*, 4 Wash., 584; *Orr* vs. *Littlefield*, 1 Wood & M., 15.

The doctrine was laid down by Lord Eldon that where a patent has been granted, and an exclusive possession of some duration had under it, the Court will interpose its injunction, without putting the patentee previously to establish the validity of his patent by an action at law. *Hill* vs. *Thompson*, 3 Morris, 622. But when the validity of the patent is not assailed and the infringement is clear, or what is the same thing, admitted, there is before the Court every ground for an injunction, which could be derived from overwhelming proof and adjudication thereon. The presumption arising from the grant is ample as against a defendant who admits he has appropriated an invention secured to another by letters patent which are not attacked.

In the United States, where a Court of Equity having heard a case on full proofs is well satisfied of the originality of an invention, the regularity of a patent, and of the fact of infringement, it will not send the case to a jury to have its verdict prior to granting a perpetual injunction. It will grant it at once. *Goodyear* vs. *Day*, 2 Wall. Jr., 283. "It is true," observed GRIER J. "that in England the Chancellor will generally not grant a final and perpetual injunction in patent cases, *where the answer denies the validity of the patent*, without sending the parties to law to have that question decided. But even there the rule is not absolute or universal. It always rests on the sound discretion of the court. A trial at law is ordered by a Chancellor to inform his conscience; not because either party may demand it as a right, or that a court of equity is incompetent to judge of questions of fact or of legal titles." Id.

296, S. P., *Tracey* vs. *Torrey*, 2 Blatchf. 276. *Buck* vs. *Gill*, 4 McLean 174.

In order to successfully resist a motion for an injunction to restrain the infringement of a patent, where no question is made as to the use by the defendant of the thing patented, facts must be shown on the part of the defendant, tending to prove that the plaintiff was not the inventor of the thing patented within two years before his application for the patent.

It is not a sufficient answer to such a motion, that the infringement has been discontinued and is not intended to be resumed; no compensation for the unlawful use having been made. There is no necessity that the validity of a patent should be established on a trial at law, before an injunction can be granted, where the case is a clear one for the plaintiff, even though it be shown that the defendant is able to respond in damages. *Sickels* vs. *Mitchell*, 3 Blatchf. 548.

The rules in respect to injunctions to restrain a party in a suit at law, whatever may be the character of such a suit—for instance, to restrain an action of ejectment—differ materially from those which govern courts in granting or refusing injunctions in cases of invention and copyright.

A jury trial of the alleged infringement has not been a prerequisite for the action of the court in England since 1761.

In England, for more than eighty years, injunctions—both provisional and perpetual—have been granted, in the first instance, in cases of copyrights and patents, and where they have been perpetual in the first instance they have been made so without

the intervention of a jury to try the question of title or infringement, *in all cases* where the court was fully satisfied with the proof, *notwithstanding the defendants may have denied in their affidavits or answers the originality of the invention, or the sufficiency of the specification.* WAYNE, J., in *Motte* vs. *Bennett*, 2 Fish., 643

As a general rule, if the plaintiff has made out a clear title and the question of infringement presents no difficulty, an injunction will be granted. *Potter* vs. *Whitney*, 3 id., 77.

It is not necessary to entitle the complainant to an interlocutory injunction that there should be a special prayer for such process, where the bill shows a *prima facie* case for an injunction. *Goodyear* vs. *Muller*, id., 420.

"There is no necessity that the validity of a patent should be established in a trial at law before an injunction can be granted. The chief use of its being so established is to show, where a defendant denies that the patentee was the inventor or claims that the invention was known and used two years before the application for the patent, that there is no foundation for such denial or for such claim. But, in this case, there is no sufficient denial of the invention by the plaintiff, and no sufficient denial that the invention was either known or used two years before the date of the application for the patent. The other allegations are not sufficient to stop the injunction. It is too much for a defendant in a clear case to insist upon having the privilege of using a patented invention, for the reason that he is able to pay the damages, which may be awarded against him, at the end of a protracted litigation to ascertain their amount." *Sickels* vs. *Mitchell*, 3 Blatchf., 553.

It is no objection in a suit in Equity, for the infringement of Letters Patent, to granting to the

plaintiff, on the final hearing, relief by a perpetual injunction and an account of profits; that the patent has not been established at law; and that no preliminary injunction has been applied for or granted in the suit; and that the plaintiff has not applied for the trial of issues to determine the questions of the validity of the patent, and of its infringement raised by the defendant. *Buchanan* vs. *Howland*, 5 Blatchf., 152.

Where a bill in Equity, for the infringement of a patent, prays for a discovery and an account of profits, and alleges that the plaintiff has no adequate remedy except in Equity, it is not demurrable on the ground that the plaintiff has an adequate remedy at law. *Perry* vs. *Corning*, 7 *Id.*, 195.

If the party sued as an infringer admits the infringement, but asserts that, after notice or service of the injunction, he had refrained from the use of the thing patented, and that he will not again infringe, it is no reason why the injunction should not issue or be made perpetual. The complainant in such a case is not obliged to rest his interests on the mere asseveration of the party that he will not repeat the act of infringement. *Jenkins* vs. *Greenwold*, 2 Fisher, 44.

The exigency is certainly not less where the party admits the infringement, but defiantly persists in it, and wholly refuses to desist from it. As the case is presented in the record the right of the plaintiff is clear, and the violation of right, on the part of the defendant, is equally clear.

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